Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

EDWARD MAGGIORE,

Petitioner,

– v. –

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the constitutional doctrine of separation of powers violated when a federal judge interferes with the prosecution's executive decision to fulfill its commitment to a cooperating witness under U.S.S.G. § 5K1.1?

2. Does it violate the Fifth Amendment's Due Process Clause for the government to withdraw the benefits of a cooperation agreement from a witness, whose truthful testimony resulted in nine convictions, based solely upon false but *immaterial* representations?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS AND ORDERS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING CERTIORARI	
1. THE SECOND CIRCUIT'S DECISION, WHICH ENABLES THE GOVERNMENT TO BREACH ITS COOPERATION AGREEMENT WITH A WITNESS WHO HAS PROVIDED SUBSTANTIAL ASSISTANCE AND PUT HIS LIFE ON THE LINE BASED SOLELY UPON ITS BELIEF THAT THE WITNESS MADE A FEW *IMMATERIAL* MISREPRESENTATIONS DURING HIS LENGTHY PERIOD OF COOPERATION, WILL SERIOUSLY IMPAIR THE WILLINGNESS OF COOPERATING WITNESSES TO WORK WITH THE GOVERNMENT AND GIVE TESTIMONY AT TRIAL	9

2. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS RELATING TO WHETHER AN EVIDENTIARY HEARING IS WARRANTED TO INVESTIGATE THE GOVERNMENT'S REVERSAL OF A DECISION TO MAKE A § 5K1.1 MOTION 12

3. THE SECOND CIRCUIT'S DECISION, WHICH ENABLES FEDERAL JUDGES TO INTERFERE WITH THE PROSECUTION'S EXECUTIVE DECISION TO FULFILL ITS COMMITMENT TO A COOPERATING WITNESS, VIOLATES THE SEPARATION OF POWERS DOCTRINE AND CONFLICTS WITH RECENT AUTHORITY FROM THE SEVENTH CIRCUIT 13

CONCLUSION 14

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases:

Gilbert v. Department of Justice,
334 F.3d 1065 (Fed. Cir. 2003) 11

United States v. Pipes,
125 F.3d 638 (8th Cir. 1997), *cert. denied*,
523 U.S. 1012 (1998) 12

United States v. Zingsheim,
384 F.3d 867 (7th Cir. 2004) 13

Wade v. United States,
504 U.S. 181 (1992) 12-13

Statutes:

18 U.S.C. § 1959 ..... 4, 5

18 U.S.C. § 3553(e) 2, 13

28 U.S.C. § 455 1

28 U.S.C. § 1254(1) 2

U.S.S.G. § 5K1.1 ..... *passim*

Other Authorities:

"Men Who Cooperated in Gang Murder Case Sentenced to Prison," *Associated Press* (April 9, 2004) 9

Maria Limbert, *Problems Associated with Prosecutorial Control Over Filing Substantial Assistance Motions and a Proposal for a Substantial Assistance Presentence Hearing*, 27 J. Legis. 251 (2001) 9

Petitioner Edward Maggiore respectfully requests that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding. The opinion was filed on March 7, 2005.

OPINIONS AND ORDERS BELOW

(1) On April 8, 2004, Judge John Gleeson, of the United States District Court for the Eastern District of New York, denied Petitioner's motion for specific performance of his Cooperation Agreement, in an unpublished oral decision. The transcript of that decision is reprinted in the Appendix hereto at App. 17-26.

(2) On April 8, 2004, Judge Gleeson also denied Petitioner's motion, pursuant to 28. U.S.C. § 455, for his recusal. That decision appears at App. 7-16.

(3) An unpublished summary order of the Second Circuit, dated March 7, 2005, affirmed the District Court's judgment sentencing Petitioner to *life imprisonment*. *See* App. 1-6.

(4) The order of the Second Circuit, dated July 22, 2005, denying Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* is reproduced at App. 27-28.

JURISDICTION

The opinion and judgment of the Second Circuit were filed on March 7, 2005. A Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied by the Second Circuit on July 22, 2005. The 90-day period for filing this petition for certiorari expires on Thursday, October 20, 2005. *See* Rule 30.1. The jurisdiction of this Court to review the ruling of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3553(e), entitled "Limited Authority to Impose a Sentence Below a Statutory Minimum," provides as follows:

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

Section 5K1.1 of the United States Sentencing Guidelines, entitled "Substantial Assistance to Authorities (Policy Statement)," provides as follows:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.
>
> (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;
>
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> (5) the timeliness of the defendant's assistance.

STATEMENT OF THE CASE

On July 1, 1999, Thomas Palazzotto, a member of a gang called the Luquer Street Boys, was shot and killed in Brooklyn, New York. Seventeen months later, Petitioner Edward Maggiore was arrested and charged with conspiring to assault Palazzotto, in violation of 18 U.S.C. § 1959. Even though it jeopardized his own safety, Maggiore agreed to cooperate with the government and provided valuable information against violent gang members.

Starting with his initial proffer session, Maggiore helped extensively with the Palazzotto shooting investigation, as well as other crimes unknown to the government (Second Circuit Appendix at A. 203). In fact, the government acknowledged that information "provided by Maggiore led, in significant part," to the *indictment and guilty pleas of nine gang members* who participated in a shoot-out and unrelated assault (Second Circuit Appendix at A. 203).

As part of his cooperation, Edward Maggiore also testified at the trial of Angel D'Angelo for the Palazzotto homicide. Based on Maggiore's testimony, which was corroborated by other evidence in the record and subjected to rigorous cross-examination, the jury unanimously found that D'Angelo killed Palazzotto and convicted him of murder.[1]

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[1] Angel D'Angelo admitted shooting Palazzotto and, immediately after the incident, suddenly relocated upstate (Second Circuit Appendix at A. 216; Second Circuit Government Appendix at GA. 15). On the day of the shooting, D'Angelo also had obtained a "Ziploc sandwich bag full" of bullets from a friend (Second Circuit Appendix at A. 87).

At trial, Maggiore "exceeded expectations and, in the government's view, testified credibly and effectively" (Second Circuit Appendix at A. 204). Because of his "substantial assistance," the government sought to enforce its cooperation agreement.[2] Thus, the federal prosecutors requested, pursuant to the cooperation agreement and U.S.S.G. § 5K1.1, that the court sentence Maggiore below the *mandatory life sentence* provided for under § 1959 and the applicable Guidelines (Second Circuit Appendix at A. 200, 205).

However, Judge Gleeson stunned everyone when he declared, *sua sponte*, that he simply did not believe Maggiore or the other witnesses who testified at D'Angelo's trial. Therefore, even though the jurors unanimously concluded that D'Angelo was responsible for the murder, Judge Gleeson personally believed that Maggiore and another cooperating witness, Robert Alvarado, shot Palazzotto (Second Circuit Appendix at A. 206-07, 260). The court's wholly unexpected statements left the government and counsel for the cooperating witness dumbfounded (Second Circuit Appendix at A. 209).

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[2] The United States Attorney's office commended Maggiore because he "has been forthcoming and truthful about his own criminal activities and the criminal conduct of others" (Second Circuit Appendix at A. 203). The government detailed the nine convictions — other than D'Angelo's — that resulted from Maggiore's cooperation (Second Circuit Appendix at A. 203-04). The prosecutors also praised Maggiore because he "prepared in earnest and took his responsibilities seriously" (Second Circuit Appendix at A. 204).